



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

January 31, 2019 Government Records Council Meeting

Rick Robinson  
Complainant

Complaint No. 2015-410

v.

NJ Department of Human Services,  
Division of Medical Assistance and Health Services  
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council ("Council") considered the January 22, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant paid the Custodian \$793.16 in requested special service charges, and the Custodian subsequently provided the Complainant with approximately 250 pages of responsive records in return for said payment on March 7, 2016, the issue of whether special service charges were appropriate in this matter is moot.
2. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint which are listed in Table 2 above, to determine the validity of the Custodian's assertion that they were lawfully denied in whole or in part because said records contain advisory, consultative or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of January, 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 4, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
January 31, 2019 Council Meeting**

**Rick Robinson<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-410**

**v.**

**New Jersey Department of Human Services,  
Division of Medical Assistance and Health Services<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Any communications between CMS and the New Jersey Department of Human Services regarding Medicaid State Plan Amendments to State Plan Attachment 4.19-B, Reimbursement for Pharmacy Services, or any other part of the State Plan addressing pharmacy reimbursement.”<sup>3</sup>

**Custodian of Record:** Dianna Rosenheim

**Request Received by Custodian:** December 9, 2015

**Responses Made by Custodian:** December 9, 17, and 21, 2015

**GRC Complaint Received:** December 23, 2015

**Background<sup>4</sup>**

**Request and Responses:**

On December 9, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On that same date, the Custodian responded in writing, providing a link to the State Plan and directing the Complainant to the proper section of the State Plan in response to part of his request. The Custodian informed the Complainant that the agency would further respond to the request in the “near future.” Thereafter, on December 17, 2015, which was the sixth (6<sup>th</sup>) business day following receipt of the request, the Custodian sought an extension of time until December 30, 2015.

On December 21, 2015, the Custodian responded in writing to each of the request items within the OPRA request. For request item number 5, which is the only request item relevant to this complaint, the Custodian stated that she denied the request because, “[i]t will cost in excess

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> This is request item number 5. There were other records requested that are not relevant to this complaint.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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of \$350 to review our records for documents sought this section (sic) of your request. As such, your request . . . is denied based on the maximum cost authorized by you.” The Custodian also denied the Complainant’s request item as advisory, consultative or deliberative (“ACD”) material, stating, “. . . the materials requested in item #5 were essential to the agencies’ deliberations and are reflective of the agencies’ deliberations. Therefore the records are exempt from release under OPRA.”

#### Denial of Access Complaint:

On December 23, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on December 9, 2015, he requested the records relevant to this complaint, and on December 21, 2015, the Custodian denied the request because responding to the request would cost more than \$350.00, which was the maximum amount the Complainant authorized in order to fulfill the request. The Complainant stated that he appealed the denial based upon the cost because the Custodian never provided him with any specifics concerning calculation of the cost. Moreover, the Complainant stated that he would have been willing to augment the maximum cost.

The Complainant stated that the Custodian also denied the request because the requested records consisted of ACD material. However, the Complainant stated that the Custodian’s response did not provide any explanation of the types of records or communications with CMS that were in the Custodian’s possession. The Complainant also asserted that the request would include transmittals, and it is unlikely such transmittals would contain ACD material. As such, the Complainant took issue with the Custodian’s denial of all requested records because they constitute ACD material.

#### Statement of Information:

On January 29, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s request on December 9, 2015, and on that same date responded by providing a link to the State Plan. The Custodian further certified that on December 17, 2015, she sought an extension of time until December 30, 2015. The Custodian certified that on December 21, 2015, she fully responded to the request.

The Custodian certified that the cost to fulfill the request would exceed the \$350.00 maximum amount authorized by the Complainant. The Custodian stated that the cost for the staff to search for responsive records has already exceeded \$768.00. The Custodian further certified that the requested e-mail and correspondence exchanges between the agency and the Center for Medicare and Medicaid Services were made before the final state plan amendment was agreed-upon. As such, the Custodian certified that the records are exempt from access under N.J.S.A. 47:1A-1.1 because they are pre-decisional and constitute ACD material. The Custodian cited Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009), as holding that a record is entitled to deliberative-process protection if it was used in the decision-making process and its disclosure would expose deliberative aspects of the process. The Custodian further stated that, if these records were disclosed, the disclosure would have a chilling effect on the ability of the federal and state governments to communicate and negotiate in the process of administering the Medicaid program.

The Custodian in the document index (item #9 of the SOI), listed 89 e-mails and letters responsive to the request. Fifty-one (51) records were denied in whole or in part because the Custodian certified that the records contained ACD material pursuant to N.J.S.A. 47:1A-1.1. Thirty-eight (38) of the records were determined by the Custodian to be subject to disclosure. The Custodian certified that the records that were partially disclosable, as well as the records that were fully disclosable, would be disclosed to the Complainant upon payment of the special service charge. The Custodian certified that all final approved State Plan Amendments were provided to the Complainant.

Additional Submissions:

On December 4, 2018, the GRC forwarded to the Custodian a Special Service Charge Questionnaire. The GRC asked the Custodian to complete and return the questionnaire. The GRC also asked the Custodian whether the document index (item #9 of the SOI), which listed 89 e-mails and letters, was responsive to request item number 5.

On December 7, 2018, the Custodian provided the responses set forth in Table 1 to the GRC's Special Service Charge Questionnaire. The Custodian certified that, "... since the fee was paid and all records were retrieved, redacted, copied and produced shortly after the complaint was filed with the GRC in this matter, all fees, personnel levels, hourly rates, and staffing levels [reflected in the questionnaire answers] are based on the actual information available and or used to compile this data in 2015.

**TABLE 1**

<b>Questions</b>	<b>Custodian's Responses</b>
1. What records are requested?	Any communications between CMS and the New Jersey Department of Human Services regarding Medicaid State Plan Amendments to State Plan Attachment 4.19-B, Reimbursement for Pharmacy Services, or any other part of the State Plan addressing pharmacy reimbursement.  Requestor subsequently paid the \$793.16 special service charge and was provided with the records on March 7, 2016. See the records at Exhibit B. <sup>5</sup>
2. Give a general nature description and number of the government records requested.	This information was specified in detail, including the number of pages for each responsive record, in the Document Index attached as #9 to the SOI. That index is attached here for reference as Exhibit A.
3. What is the period of time over which the records extend?	From 2006 to 2013.

<sup>5</sup> Exhibit B, which the Custodian attached to the Special Service Charge Questionnaire contains approximately 250 pages of correspondence and other documents.

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4. Are some or all of the records sought archived or in storage?	No
5. What is the size of the agency (total number of employees)?	DMAHS has approximately 500 employees.
6. What is the number of employees available to accommodate the records request?	Three different employees worked on this request, however each are or were full time employees with their own regularly assigned duties. They were charged with retrieving and/or redacting these documents to accommodate the requirements of the OPRA request, but the work was accomplished in between and in addition to their regular duties.
7. To what extent do the requested records have to be redacted?	Each of the approximately 570 pages of documents had to be inspected line-by-line to determine what if any confidential materials needed to be redacted. The records reflect negotiations between the State and federal governments on the Medicaid state plan. The final outcome of these negotiations are in the State Plan amendments that are available to the public at: <a href="https://www.state.nj.us/humanservices/dmahs/info/state-plan.html">https://www.state.nj.us/humanservices/dmahs/info/state-plan.html</a> . Approximately 400 pages of materials contain in-line redactions or were withheld as specified in the Document Index attached as #9 to the SOI.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	Regulatory Officer 4 – Ms. Hubbs and Ms. McLaughlin were the authors and/or recipients of the correspondence and documents being requested, and, therefore, were requested to search their files and produce those documents and or transmissions responsive to the OPRA request.  Principal Clerk Typist – Ms. Sweeney was administrative personnel charged with assisting in gathering and copying and/or scanning documents for production to the requestor.  See also answer to #12 below.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	See answer to #8 above.
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records	See answer to #8 above.

to their original storage place?	
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The individuals identified in #8 and #12 are or were employees of DMAHS with direct knowledge of and or access to the requested records.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Julie Hubbs (Regulatory Officer 4; Hourly rate = \$45.20)  Zoe McLaughlin (Regulatory Officer 4; Hourly rate = \$45.20)  Stacey Sweeney (Principal Clerk Typist; Hourly rate = \$25.56)
13. What is the availability of information technology and copying capabilities?	DMAHS staff has photocopiers and computers on premises to utilize, however, these resources are shared by the entire office.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	Julie Hubbs = 7.0 hours for gathering and review of documents  Zoe McLaughlin = 1.5 hours for gathering and review of documents  Stacey Sweeney = 16.0 hours assisting in gathering and then copying and/or scanning documents

The Custodian also responded to the GRC's inquiry concerning whether item #9 of the SOI was responsive to request item number 5. The Custodian stated that item #9 was responsive to request item number 5, and she directed the GRC's attention to Exhibit B which contains copies of non-confidential records that were disclosed to the Complainant on March 7, 2016 following his payment of the special service charge.

On December 7, 2018, the GRC telephoned the Complainant. The GRC asked the Complainant to confirm that he received the records responsive to his request as set forth by the Custodian in the Special Service Charge Questionnaire. The GRC also asked the Complainant if he was satisfied that the document index, item #9 of the SOI, adequately identified the types of records or communications between the agency and CMS that are in the agency's possession, as well as the legal explanation for denial of purported ACD material.

The Complainant said that he was still in the process of reviewing the Custodian's responses in the Special Service Charge Questionnaire, but that he or his staff member, Meghan, would get back to the GRC with an answer no later than December 10, 2018.

On December 11, 2018, the Complainant telephoned the GRC. The Complainant stated that the requested special service charge was paid and the Custodian thereafter disclosed some of

the records. The Complainant stated that the special service charge is no longer an issue. However, the Complainant stated that, with respect to the records that were denied as ACD material, he does not believe that the assertion of the ACD privilege applies to many of the records for which it has been claimed. The Complainant stated that the cover e-mails that were previously disclosed represent back and forth communications between the State Medicaid agency and the federal government regarding the State's request for various State Plan Amendments and the federal government's responses, as well as additional questions posed to the State agency. The Complainant asserted that many of the denied records should have therefore been disclosed.

### **Analysis**

#### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

#### **Special Service Charge**

The first issue in this complaint concerns a special service charge. The Custodian stated that the cost for the agency's staff to produce records responsive to the request would exceed the \$350.00 maximum amount authorized by the Complainant. For this reason, the Custodian denied the request. The Complainant stated that the Custodian failed to provide sufficient specificity to justify her assessment of a charge in excess of \$350.00. Moreover, the Complainant stated that he was willing to augment the maximum authorized amount.

Because the Custodian asserted that a special service charge pursuant to N.J.S.A. 47:1A-5(c) would be necessary, the GRC asked the Custodian to complete a Special Service Charge Questionnaire with certified responses, so that the GRC could determine if an extraordinary expenditure of time and effort would be justified in order to accommodate the request. When the Custodian returned the completed Special Service Charge Questionnaire to the GRC, her answer to the first question was that the "requestor subsequently paid the \$793.16 special service charge and was provided with the records on March 7, 2016." The evidence of record reveals that the Custodian disclosed approximately 250 pages of responsive correspondence and other documents to the Complainant in return for payment of the special service charge amount.<sup>6</sup>

Therefore, because the Complainant paid the Custodian \$793.16 in requested special service charges, and the Custodian subsequently provided the Complainant with approximately 250 pages of responsive records in return for said payment on March 7, 2016, the issue of whether special service charges were appropriate in this matter is moot.

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<sup>6</sup> The GRC was neither copied on this transaction, nor otherwise informed by the parties that a special service charge was paid and records were disclosed.

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### Records Withheld as ACD material

Of the eighty-nine (89) records responsive to request item number 5, fifty-one (51) were denied in whole or in part as ACD material pursuant to N.J.S.A. 47:1A-1.1. A description of the denied records or parts thereof is contained in Table 2.

**TABLE 2**

<b>Item No.</b>	<b>Record Responsive to the Request</b>	<b>Description of Denial</b>	<b>Legal Reason</b>
1	E-mail from McLaughlin to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> dated 09/30/11 (14 pages)	SPA 11-14 Reimbursement for Pharmaceutical Services	ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1
2	E-mail from Balbuena to McLaughlin, Popkin, Rose & Sweeney dated 12/12/11 (5 pages)	NJ SPA 11-14	Same as Item 1
3	E-mail from McLaughlin to Balbuena dated 03/02/12 (2 pages)	RE: Thank you	Same as Item 1
4	E-mail from Balbuena to McLaughlin dated 06/13/12 (7 pages)	RE: SPA 11-14	Same as Item 1
5	E-mail from McLaughlin to Balbuena dated 07/16/12 (15 pages)	RE: SPA 11-14	Same as Item 1
6	E-mail from Balbuena to McLaughlin dated 07/16/12 (3 pages)	RE: SPA 11-14	Same as Item 1
7	E-mail from McLaughlin to Balbuena dated 07/31/12 (4 pages)	RE: SPA 11-14	Same as Item 1
8	E-mail from Balbuena to McLaughlin dated 08/15/12 (3 pages)	RE: SPA 11-14	Same as Item 1
9	E-mail from Balbuena to McLaughlin dated 08/22/12 (3 pages)	RE: SPA 11-14	Same as Item 1
10	E-mail from McLaughlin to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> dated 09/30/11 (14 pages)	NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
11	E-mail from Salce to McLaughlin dated 10/18/12 (5 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
12	E-mail from McLaughlin to Balbuena dated 10/15/12 (4 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
13	E-mail from Salce to McLaughlin dated 10/2/12 (2 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
14	E-mail from Salce to McLaughlin dated 10/18/12 (5 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1

15	E-mail from McLaughlin to Salce, Balbuena and Simananda dated 10/24/12 (13 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
16	E-mail from Balbuena to McLaughlin dated 10/24/12 (13 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
17	E-mail from McLaughlin to Salce, Balbuena and Simananda dated 10/24/12 (2 pages)	SPA 11-14 responses to additional questions	Same as Item 1
18	E-mail from Balbuena to McLaughlin dated 10/24/12 (6 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
19	E-mail from Salce to McLaughlin dated 10/24/12 (5 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
20	E-mail from McLaughlin to Salce and Simananda dated 11/30/12 (10 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
21	E-mail from McLaughlin to Salce and Simananda dated 11/30/12 (10 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
22	E-mail from Salce to McLaughlin and Simananda dated 02/12/13 (16 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
23	E-mail from Salce to McLaughlin dated 02/12/13 (8 pages)	RE: NJ SPA 11-14 Pharmaceutical Reimbursement	Same as Item 1
24	E-mail from Stokley to Popkin dated 12/23/09 (8 pages)	FW: SPA 09-05 Pharmacy CMS formal questions	Same as Item 1
25	E-mail from Stokley to Harr, Keevey, Popkin, Springer and Azoia dated 05/05/10 (35 pages)	FW: NJ State Plan Amendment 09-05 Reply to RAI	Same as Item 1
26	E-mail from Rose to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> Smith, Alberino, Leeds and Reed dated 07/26/10 (21 pages)	SPA 09-05 MA (NJ) Pharmaceutical Services	Same as Item 1
27	E-mail from Rose to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> Smith, Alberino, Kelly, Leeds, Reed and Howell dated 07/27/10 (13 pages)	SPA 09-05 MA (NJ) Withdrawal of RAI response	Same as Item 1
28	E-mail from Stokley to Leeds dated 08/24/10 (25 pages)	SPA 09-05 revised documents (renumbered as 09-	Same as Item 1

		05A and 09-05B and minor edits)	
29	E-mail from Rose to Azoia, Keevey, Popkin, Murphy and Vaccaro dated 06/23/11 (10 pages)	FW: SPA 11-03-MA (NJ) SUL for multi-source drugs	Same as Item 1
30	E-mail from Popkin to Balbuena dated 08/17/11 (17 pages)	RE: NJ SPA 11-03	Same as Item 1
31	E-mail from Popkin to Hubbs dated 09/16/11 (3 pages)	RE: NJ SPA 11-03 RAI	Same as Item 1
32	E-mail from Hubbs to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> dated 11/22/11 (18 pages)	RE: SPA 11-03 MA RAI responses	Same as Item 1
33	E-mail from Balbuena to Hubbs dated 12/27/11 (1 page)	RE: SPA 11-03 convert to draft letter	Same as Item 1
34	E-mail from Hubbs to Balbuena dated 12/27/11 (10 pages)	RE: SPA 11-03 convert to draft letter	Same as Item 1
35	E-mail from Balbuena to Hubbs dated 12/28/11 (2 pages)	RE: SPA 11-03 convert to draft letter	Same as Item 1
36	E-mail from Balbuena to Hubbs dated 01/03/12 (1 page)	RE: 08-07 targeted case management	Same as Item 1
37	E-mail from Hubbs to Balbuena dated 03/14/12 (4 pages)	11-03	Same as Item 1
38	E-mail from Hubbs to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> dated 04/02/12 (18 pages)	Revised NJ SPA 11-03 RAI	Same as Item 1
39	E-mail from McLaughlin to Balbuena dated 04/09/12 (14 pages)	SPA 11-03	Same as Item 1
40	E-mail from Hubbs to Lind and Gernhardt dated 04/09/13 (4 pages)	Amendment to physician services state plan page	Same as Item 1
41	E-mail from Hubbs to Montalto dated 04/09/13 (1 page)	Companion letter to SPA 12-09 to amend phy svcs page	Same as Item 1
42	E-mail from Montalto to Hubbs dated 04/10/13 (2 pages)	Companion letter to SPA 12-09 to amend phy svcs page	Same as Item 1
43	E-mail from Hubbs to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> dated 06/04/13 (5 pages)	SPA 13-04 MA (NJ)	Same as Item 1
44	E-mail from Montalto to Hubbs dated 07/26/13 (2 pages)	SPA NJ-13-04	Same as Item 1

45	E-mail from Hubbs to Montalto dated 08/12/13 (6 pages)	RE: SPA NJ-13-04	Same as Item 1
46	E-mail from Hubbs to Montalto dated 08/23/13 (10 pages)	RE: SPA NJ-13-04	Same as Item 1
47	E-mail from Montalto to Hubbs dated 08/29/13 (3 pages)	SPA NJ-13-04 RAI	Same as Item 1
48	E-mail from Hubbs to <a href="mailto:SPA_Waiver_NewYork_R02@ams.hhs.gov">SPA_Waiver_NewYork_R02@ams.hhs.gov</a> dated 09/17/13 (16 pages)	NJ response to RAI for SPA 13-04	Same as Item 1
49	E-mail from Hubbs to Montalto dated 11/12/13 (10 pages)	SPA 13-04	Same as Item 1
50	CMS letter from Kelly to Kohler dated 03/10/06 (28 pages)	SPA 05-17	Same as Item 1
51	CMS letter from Kelly to Kohler dated 02/01/06 (12 pages)	SPA 05-18	Same as Item 1

The Complainant disputed the Custodian's assertion that all of the denied records contain ACD material.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>7</sup> dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court also stated that:

The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to

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<sup>7</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the records relevant to this complaint which are listed in Table 2 above, to determine the validity of the Custodian's assertion that they were lawfully denied in whole or in part because said records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. Because the Complainant paid the Custodian \$793.16 in requested special service charges, and the Custodian subsequently provided the Complainant with approximately 250 pages of responsive records in return for said payment on March 7, 2016, the issue of whether special service charges were appropriate in this matter is moot.
2. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint which are listed in Table 2 above, to determine the validity of the Custodian's assertion that they were lawfully denied in whole or in part because said records contain advisory, consultative or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 2 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule R. 1:4-4,<sup>10</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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<sup>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Rick Robinson v. New Jersey Department of Human Services, Division of Medical Assistance and Health Services, 2015-410 – Findings and Recommendations of the Council Staff

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart

January 22, 2019